ESSAY

ON

ULTRA VIRES.

BY

HOMER H. SWANEY.

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ULTRA VIRES.

A corporation is an artificial person created by law for a specific purpose,[1] with such a grant of privileges as secures a succession of members,[2] without losing its identity. It exists independent of the persons who compose it,[3] but has no existence independent of the acts creating it,[4] and derives all its powers from those acts,[5] and its powers are specifically granted and can only be exercised for the purposes contemplated.[6] By means of its agents,[7] within the terms of its incorporation,[8] it can transact business like a natural person.[9]

It has certain incidental powers, viz: to sue and be sued; to contract obligations concerning personal and real property according to the powers conferred upon it; to exercise certain political powers, and to make by-laws to further the purposes of its incorporation, provided they are in harmony with the provisions of its charter and the general laws of the State.[10] And the law of corporations is destined to become the most important branch of our municipal laws.

The common law gave to corporations large powers and privileges, but with the multiplication of corporations in modern times, it became necessary to have the existence and operation of those corporate bodies limited and curtailed by laws distinctly defining their rights, duties and liabilities, and it was through the courts invoking the preventative and remedial measures of the law, as between the stockholder and the cor-

1, Bouvier's Law Dic., p. 367.
2, People *v.* Assessors, 1 Hill., 620.
3, Dartmouth. College *v.* Woodward, 4 Wheat., 636.
4, Shrewsbury, &c., R. Co. *v.* L. & G. N. R. Co., 22 L. J. Ch., 682.
5, Balto. *v.* Balto., 22 Md., 50.
6, Beatty *v.* Knowler, 4 Pet., 152; Perrine *v.* Ches. and Del. Canal Co., 9 How., 172.
7, Anson on Cont., p. 113.
8, 5 Ohio, 205.
9, People *v.* Ass'rs, *supra.*
10, Austin *v.* Murray, 16 Pick., 121; Gallitin *v.* Bradford, 1 Bibb., 209; *ex parte,* Burnett, 30 Ala., 461.

poration and the corporation and the public, that the doctrine of *ultra vires* was introduced.

It is an example of judge-made law; for it is in the words of no statute, nor yet is it found in the old common law of corporations. It is a principle, than which there is none more difficult to apply.[11]

The phrase *ultra vires* was used by a writer[12] on equity many years before it was applied to the law of corporations either by courts of equity or of law. In its modern application it means beyond the "*authority* or *competency*" of a[13] corporation and is equivalent to *ultra licitum*.

It has no reference to the acts of a corporation contrary to public policy and illegal.[14] Illegality has a totally different idea embodied in it.[15] It does not mean that the corporation did not or could not make the contract, but that it ought not to have made it,[16] and that the act was unauthorized.[17]

The doctrine of *ultra vires* is, that all acts of a corporation, not within the powers conferred upon it by its charter, or the statutes under which it was instituted, or reasonably implied therefrom, are null and void, and as to such acts the corporation may be restrained in equity by an injunction, or it may set up the plea of *ultra vires* as a defense to an action at law.

It may be thus used by and against the corporation. The question whether a particular act is *ultra vires* of a corporation is determined by a construction of its constating instruments. If the act is prohibited, or against public policy, it is not *ultra vires*, it is illegal.

This doctrine is supported by the following reasons:[18]

1st. By tolerating *ultra vires* acts, the powers of corporations would be extended indefinitely, and might jeopardize the sovereign power which created them.

2d. By allowing the corporation to embark in new enterprises, the public might lose its expected benefits and the stockholders their anticipated profits.

3d. That as all persons are presumed to know the extent of the powers conferred upon a corporation by its charter, a party entering into a contract, not within those powers, should not be permitted to complain that such contract was void.

11, Lord Cairns in Riche's case, 9 Ex., 258
12, Lord Kame's Principles of Equity, 3d Ed., p. 309.
13, Nat. Pemberton Bank *v.* Potter, 125 Mass., 333; Morawetz on Priv. Corp.
14, Riche *v.* Ashbury R. Co., 7 H. L., 653.
15, Bissell *v.* M. S. & N. I. R. Co., 22 N. Y., 258.
16, Parson's Cont., vol. 1, p. 142.
17, Whitney Arms *v.* Barlow, 63 N. Y., 68.
18, Field's Ultra Vires, p. 58.

The common law doctrine of corporate power,[19] together with the fact that corporations possessing extensive powers were only recently introduced into England,[20] did not tend to produce such a principle as *ultra vires* there.

It was in the United States, where corporations are more numerous,[21] and where narrower views are taken of their expressed and implied powers,[22] that this now important branch of corporate law was first announced. It arose through the interpretation of the powers granted to a corporation by its charter.

The early view of the courts of this country was that a corporation was *non-existent* unless for the purposes for which it was created, and that an act not within the scope of its charter was held not to be the act of the corporation, and therefore not binding upon it. This view was based upon the limited capacities of a corporation, and was discussed as early as 1804. This position is found in Head *v.* Providence Insurance Company; [23] People *v.* Utica Insurance Company;[24] Fireman's Insurance Company *v.* Sturges.[25]

When this question first came before the English courts, in 1846, they adopted the American view as to the limited capacities of corporations.

It was held by Lord Langdale, in Coleman *v.* Eastern Counties Railway Company,[26] that it was *ultra vires* for a railroad company to establish a steam-packet line to run in connection with its line; (also in Salomons *v.* Laing),[27] to increase the number of shares against dissenting shareholders, saying in the latter case, "a company incorporated by act of Parliament is bound to apply all the money and property of the company for the purposes directed and provided by the act, and for no other purpose whatsoever." It was similarly maintained by Wigram, V. C.,[28] Turner, L. J., [29] and Pollock, L. C. B.[30]

But the leading English case on the subject of *ultra vires* is East Anglian R. Co. *v.* Eastern Counties R. Co.[31] In this

19, Case of Sutton's Hospital, 10 Coke, 1.
20, Coleman *v.* Eastern Co.'s R. Co., 10 Beav., 1.
21, Commonwealth *v.* Arrison, 15 S & R., 127.
22, Dartmouth Col. *v.* Woodward, *supra.*
23, 2 Cranch, 166.
24. 15 Johns, 358
25, 2 Cowan, 64; to the same effect, see Strause *v.* Eagle Ins. Co., 5 Ohio St., 60. In the latter the court said: "That "beyond the limits of the intention of "the Legislature it has no existence, "and its acts are neither more nor less "than a mere *nullity.*"
26, 10 Beav., 1.
27, 2 Beav., 339.
28, Bagshaw *v.* Eastern Union R. Co., 7 Hare, 114.
29, Shrewsbury R. Co. *v.* L. and N. W. R. Cos., *supra*
30, National Manure Co. *v.* Donald 28 L. J. Ex., 188.
31, 11 C. B., 775.

case the defendants covenanted to pay the cost of preparing and promoting bills in Parliament, and the action was to recover such cost. Jervis, C. J., delivering the opinion of the court said: "It is clear the defendants have a limited author- "ity only, and are a corporation only for the purpose of mak- "ing and maintaining the railway sanctioned by the act, and "that their funds can only be applied for the purpose directed "and provided by the statute, * * * We know that the "statute incorporating the defendant's company, gives no "authority respecting the bills promoted by the plaintiffs, * "* and any contract relating to such bills * * * is not "within the scope of the authority of the company as a cor- "poration, and is therefore void."

Other judges, and subsequently Lord Langdale, held that the unauthorized acts of a corporation were not only *void* but *illegal*.[32]

This position is not now maintained, unless the act is prohibited.[33] Nevertheless, the English courts, in the early cases, went further in supporting this doctrine of *ultra vires*, and in the Attorney-General *v.* Great Northern R. Co.,[34] Kindersley, V. C., decided that a charter not *authorizing* an act, *prohibited* it.

Substantially the same thing was decided in MacGregor *v.* Dover & Deal R. Co.[35]

This extreme view was not long sustained, for Baron Parke, in South Yorkshire Railway and River Dunn Company *v.* Great Northern R. Co.,[36] held an act was not *ultra vires* unless it appeared "by express provision of the statute creating "the corporation, or by reasonable inference from its enact- "ment * * * that the legislature *meant* that such a deed "should not be done." And in the Eastern Counties R. Co. *v.* Hawkes,[37] this question was carried to the House of Lords, and it was conceded that a matter not authorized by the charter, but collateral and within the purview of it, is not *ultra vires*. Lord St. Leonards said: "He felt a disposition to re- "strain the doctrine of *ultra vires* to clear cases of excess of "power, with the knowledge of the other party expressed or "implied from the nature of the corporation and of the

32, Coleman *v.* Eastern Cos. R. Co., *supra;* Cohen *v.* Wilkinson, 13 Jurist, 641; Salomons *v.* Laing, *supra;* Lord Cranworth held the same view in Beman *v.* Rufford, 6 Eng. L and Eq. R., 106; also Parker J., in Winch *v.* B. L. and C. Junction R. Co., 13 Eng. L. and Eq., 506.

33, Riche *v.* Ashbury R. Co., *supra;* also City of Memphis *v.* Memphis Gas Co., 9 Heisk, 543.

34, 6 Jurist, 1006.

35, 18 Q. B., 618.

36, 9 Ex., 55, 22 L. J. Ex., 304.

37, H. L. C., 331.

"contract entered into." In this case it was finally decided that a contract clearly *ultra vires* was only *void.*

The courts in the rapid growth of the doctrine of *ultra vires* did not consistently adhere to the position of the limited capacities of corporations, for they soon decided a corporation was liable for torts,[38] but if a corporation was *non-existent* for every purpose, except for such as it was authorized by its charter, and no charter authorized the commission of a tort, how could it logically be responsible for it. And further, the position most of these earlier cases took upon the subject, was plainly in conflict with the common law of corporations, as found in the case of Sutton's Hospital.[39] It is there held that the capacity of a corporation after it has once been created, to enter into a given contract, is in the nature of things, its capacity without reference to the manner of its creation. This case seems to have been lost sight of for many years, but in Riche *v.* Ashbury Railroad Co.,[40] Blackburn, J., cited the case, and reviewed the common law of corporations, and decided that whatever was not *prohibited*, might be made binding under certain circumstances, and that corporations have by implication all capacities and powers, which being reasonably incidental to their operation, are not forbidden, although if an act was *prohibited*, it never could be enforced and was illegal.

This latter view is more consistent with the action of courts concerning corporate powers and privileges, and as Justice Miller said in Thomas *v.* Railroad,[41] represents the decided preponderance of authority, both in this country and at present in England.

The foregoing gives a brief history of the doctrine. Now it shall be the aim of the writer, not to treat the doctrine of *ultra vires* in its every phase, as laid down in the books and the opinions of the courts, for that could not be brought within the compass of an essay, but from actual circumstances, under which in various cases it was or was not maintained, to show the position of the courts upon this doctrine and its force to-day.

Whether an act is *ultra vires* of a corporation can only be known by an examination of its charter, The charter of a corporation is the constitution of its being, the measure of its

38, Green's Brice's Ultra Vires, pp. 330–365.
39, 10 Coke, 30. Lord Coke holding that "when a corporation is duly created "all other incidents are *tacite* annexed," citing 1 Roll, 513; Vin. Arb. Corp. G. Com. Dig. In 22 E. 4 Grant, Brian, C. J. Coke said: "Divers clauses "in their charters are not of *necessity*, "but only *declaratary*, and well might "have been left out."
40, *Supra.*
41, 101 U. S., 71.

authority, powers and liability,[42] and the courts instead of holding that it has no powers except such as are expressly conferred, now hold that it has such incidental powers as are necessary to enforce those expressly granted,[43] and that a reasonable construction must be put upon the latter.[44] Questions of *ultra vires* relating to the express powers of corporations, are decided by a strict construction of its charter, while such as concern its implied powers, are decided by a comparison of numerous decisions and *dicta*.[45] Acts of corporations may now be *ultra vires* in a primary and secondary sense.[46] In a *primary* sense, it refers to acts which are not within the scope of the powers of the corporation to perform under any circumstances.

In the *secondary* sense, it refers to acts that might be performed for certain purposes, or with the consent of certain parties, but which have not thus been performed.

In the former the public is concerned. In the latter it is a question between the corporation and its stockholders, or between third persons and it or the stockholders.[47]

In the one case the acts are absolutely void and cannot be ratified.[48] In the other they may be affected by the conduct of the stockholders.[49]

The general rule, as to contracts of a corporation clearly proved *ultra vires*, was laid down by Chief Justice Jervis,[50] viz: that a corporation is not estopped from setting up the plea of *ultra vires* to defeat an action upon a contract. This was cited,[51] recognized,[52] and approved[53] in England, and it has been followed frequently in this country,[54] though some courts have sought to relieve against it.[55]

This interpretation of the doctrine of *ultra vires* enabled corporations to repudiate their contracts, even though they may have received the whole benefit of such contracts, and it enabled them, whenever their undertakings proved unsuc-

42, Thomas *v.* R. R., *supra.*
43, Dartmouth Col. *v.* Woodward, *supra;* Bank of Augusta *v.* Earl, 13 Pet., 519.
44, Purvine *v.* Ches., &c., Canal, *supra.*
45, Green's Brice's Ultra Vires, p. 64.
46, Miners' Ditch Co. *v.* Zellerback, 37 Cal., 543; McPherson *v.* Forster, 43 Iowa, 48.
47, Kent *v.* Quicksilver Mining Co., 12 Hun., 53; Hoyt *v.* same, 17 Hun., 169.
48, Riche *v.* Ashbury, *supra.*
49, Empire Trans. Co. *v.* Blanchard, 31 Ohio St., 650; Sanderson *v.* Ætna Iron and Nail Co., 8 Cent., L. J., 266.
50, East Anglian Railway Co. *v.* Eastern Cos. R. Co., *supra.*
51, Eastern Cos. *v.* Hawks, *supra,*
52, McGregor *v.* D. & D. R. Co., *supra.*
53, By Lord Cairns in Ashbury Co., *supra*
54, Penn. and Del., &c., Co. *v.* Dandridge, 8 Gill and J., 248; Downing *v.* Mount Washington R. Co., 40 N. H., 230; Pierce *v.* Madison, &c., R. Co., 21 How., 440; Zabriskie *v.* C. and C. R. Co., 23 *id.*, 381; Hood *v.* N. Y. and N. H. R. Co., 22 Conn., 502; Buffet *v* Troy & Bos. R Co., 40 N. Y., 168.
55, Shrewsbury and B. R Co. *v.* N W R. Co , 6 H. L. C., 113; Bissell *v.* M S. and N. I. R. R. Co., *supra;* Brown *v.* Winnissemmet Co., 11 Allen, 326; Miners' Ditch Co. *v.* Zellerbacker, *supra.*

cessful, to take advantage of their own wrong, and defraud those dealing with them in good faith.

The plea of *ultra vires* worked hardships and injustice hardly paralleled in the whole volume of the law. For though a party proceeded in the performance of a contract, expending his labor and money in the production of values, which the corporation appropriated, and at the same time the contract was beyond the scope of its power, it could interpose the plea of *ultra vires* as a perfect defense to an action to recover for the labor and money expended.

For example, take the illustration used by Chief Justice Lawrence in Bradley *v.* Ballard,[56] and carry it a little further than he does, and the great fraud this doctrine of *ultra vires* will permit becomes apparent.

A corporation is chartered to construct a railroad from Chicago to Rock Island. In this charter no powers would be given the company to build or purchase steamboats for the purpose of running on the Mississippi River from Rock Island to St. Louis. But suppose at a regular meeting of the stockholders, by vote, the directors should be authorized to make a contract for building two steamboats. The contract is let, and the contractors receive one-third in cash and the company's notes for the remainder. The boats are completed and accepted by the company, and by it insured for their full value. The boats are burned, and the company collects the full risk from the insurance company, and when the notes are due, to the demand for payment, they set up the defense that they exceeded their corporate powers in contracting to have the boats built and that therefore they are not responsible on the notes, and as the contract was beyond the scope of the powers granted, and the legislature did not intend contracts[57] of that nature should be made, such defense would be good. Or suppose the insurance company having received their premiums, should refuse to pay the insurance, or, if the boats are not burned, that the contractor should sue to recover the boats, when he had received full pay. What would there be to compel the boat company or the insurance company to make payment, or to prevent the contractor from recovering the boats, since the law held the contract by which they were insured and built void? And yet, this would be in accordance with the early decisions.

56, 55 Ill., 413.

57, Bateman *v.* Ashton. Under Lyne, 3 H. and N., 223; Norwich *v.* Norfolk R. Co., 4 El. and B., 397; Hawks *v.* Eastern Cos. R. Co., 1 Del., M., and G., 737; Pa., &c., Steam Nav. Co. *v* Dandridge, *supra*; So. Yorkshire, &c., R. Co. *v.* G. N. R. Co, 9 Ex., 55; Hood *v.* N. Y. and N. H., *supra*; Pierce *v.* Madison, &c., R. R. Co., *supra*.

But the hardships of this technical doctrine of *ultra vires* has frequently been spoken against by judges. In the Mayor of Norwich *v.* Norfolk,[58] Lord St. Leonards characterized it as "*an indecent doctrine*," that covenants entered into wilfully and with fair intentions by both parties should be resisted on the ground of *ultra vires*.

In Cary *v.* Cleveland, &c., R. Co.[59] the court said: "The "plea is not a gracious one, that a contract, which they have "deliberately made and of which they have received the full "benefit, is void for want of power in them to make it."

In Converse *v.* Norwich Co.,[60] the court said: "Courts "have gradually come to think it necessary to relax the tech- "nical and theoretical strictness of the legal principles ap- "plicable to them, and subject them to the same liabilities "for the acts of their agents as natural persons, so far as it "can be done practically and consistently with their charters. "* * * And the tendency of the courts is almost uni- "versally to recognize their powers so to do, where the pur- "pose is auxiliary, beneficial, and within a reasonable limit, "as an intended, or necessary and incidental power by a "liberal construction of the legislative grant." And the opinion of Bigelow, C. J., in Brown *v.* Winnissemmet,[61] which in this whole doctrine of *ultra vires* stands midway between Lord Langdale[62] and Justice Blackburn,[63] argues for a liberal construction. The learned judge said: "We "know no principle by which an act creating a corporation "for certain specific objects, or to carry on a particular trade "or business is to be strictly construed as prohibitory of all "other dealings or transactions not coming within the exact "scope of those designated. Undoubtedly the main busi- "ness of a corporation is to be confined to that class of "operations which properly appertains to the general pur- "poses for which its charter was granted. But it may also "enter into contracts and engage in transactions which are "incidental or auxiliary to its main business, or which may "become necessary, expedient or profitable in the care and "management of the property which it is authorized to hold "under the act by which it was created."

The safety of men in their daily dealings requires that this doctrine should be confined in narrow bounds, and the foregoing authorities evidence on the part of the courts,

58, *Supra*.
59, 26 Barb., 35.
60, 33 Conn., 166.
61, *Supra*.
62, Coleman *v.* Eastern Cos. R. Co., *supra*.
63, Riche's Cases, *supra*.

a disfavor for the doctrine and an inclination to relieve innocent parties from the hardships resulting from its technicalities as applied by private corporations.

The relief has been given concerning an act *ultra vires* in the primary sense—

1st. By a liberal construction of the constating instruments, so as to take away the very foundation of the defense.

2d. By allowing a recovery for the labor performed, or of the money paid.

And concerning acts *ultra vires* in the secondary sense, by applying the doctrine of estoppel *in pais* to exclude the defense—

1st. Where the stockholders have ratified or acquiesced in the proceeding.

2d. Where the contract has been executed or partly executed on either side.

3d. In special cases.

First. The effect of the plea of *ultra vires* destroyed by a liberal construction of the constating instruments.

And though it is well settled in Zabriskie *v.* Hackensack & New York R. Co.,[64] that the business of a corporation cannot be changed, or abandoned or sold out without the consent of all the corporators, and that the interests shall be used to accomplish the object for which the corporation has been created, yet many acts, which, according to the early cases[65] would plainly be *ultra vires* and void, have thus been decided within the incidental powers of the corporation, and the plea has been held inadmissible.

Accordingly in Forest *v.* Manchester R. Co.,[66] it was decided that a railroad company which was authorized to keep steamboats for purposes of a ferry in connection with their line, could use the boats for excursion trips, when unemployed in conveying over persons who wished to use the ferry, and that such was not *ultra vires.*

And a stage coach company, or street railway, would not be acting *ultra vires* if it should enter into a contract, that its horses might be employed in another occupation, or should let a coach or car to another person when not needed by the corporation.[67]

And in Simpson *v.* Westminster Palace Hotel Co.,[68] where the directors of a company, organized for the purpose of

64, 3 C. E. Greene, 78.
65, East Anglian R. Co. *v.* Eastern Cos. R. Co., *supra.*
66, 30 Beav., 40.
67, Brown *v.* Winnissemmet, *supra.*
68, H. L. C., 12.

building a hotel and doing everything necessary to attain that object, without the consent of all the shareholders leased part of the building for another purpose, and thereby entailed expenses on the company before and after the lease, it was held not *ultra vires*.

According to the strict construction of the charter of a corporation, it was *ultra vires* and void for corporate carriers to contract to carry beyond the terminii of their line, and was so decided in England,[69] and in the United States, in Hood *v.* New York and New Haven R. Co.,[70] and was sustained,[71] but the law is now settled in Ogdensburg and Lake Champlain R. Co., *v.* Platt,[72] that such contract is not *ultra vires*, even though the charter has no express provision authorizing it, whether the distance is by sea[73] or land.[74] But a railroad cannot buy a steamboat to run in connection with its line,[75] though it can put up stations,[76] restaurant rooms,[77] a telegraph along its line,[78] coal depots,[79] and even operate a coal mine for the special supply of the road.[80] And a corporation created to mine and transport coal has authority to buy steamboats to deliver it;[81] to mortgage its property unless it is restrained in this respect.[82]

So it is not *ultra vires* for a corporation to carry on part of its business,[83] unless it is one indivisible project,[84] nor to waive the benefit of a stipulation introduced for its own benefit, when to enforce it would in the end be detrimental to itself and the lucrative prosecution of its business.[85]

And it has been held that a corporation may issue negotiable instruments, though in Bateman *v.* Mid-Wales R. Co.[86] it was maintained that if no special power existed to issue

9, Caledonia and D Junction R. Co. *v.* H. H Trustees, 39 E. L. and Eq. R., 28.
70, 22 Conn., 502.
71, Converse *v* N. and N. Y. Trans. Co., 33 Conn., 166; Nagatuck R. Co. *v.* Waterbury B. Co., 24 Conn., 468.
72, 22 Wall, 123.
73, Wilby *v.* W. Cornwall R. Co., 2 H. and N., 703; Blake *v.* G. W. R. Co., 7 *id.*, 987; Muschamp *v.* L. and P. Junction R. Co., 8 M. and W., 421; Noyes *v.* R. and B. R. Co., 27 Vt., 110.
74, Cary, *v.* C. and T. R. Co., 29 Barb., 35; Bissel *v.* M. S. &c. R. Co., *supra;* Buffet *v.* T and B. R. Co., *supra;* Root *v.* Great Western R. Co., 45 N. Y., 524; Burtis *v* Buffalo &c., R. Co., 4 N. Y., 269; Hill M'f'g Co. *v.* Boston &c., R. Co., 104 Mass., 122; Feital *v.* Middlesex R. Co., 209 Mass., 398; Morse *v.* Brainard, 41 Mass., 550; R. R. Co. *v.* Trans. Co., 16 Wall., 324; Weed *v.* S. and S. Co., 19 Wend., 534; Hort *v.* Renesselaer and S. S. R. Co., 4 (Scld), 39; Bard *v.* Poole, 12 N. Y., (2 Kern), 495; Quimby *v.* Vanderbilt, 71 N. Y., 306.
75, Pierce *v.* M. &c., R. Co., *supra;* Hoagland *v.* H. and St. Joseph R. Co., 39 Mo., 451.
76, Cochin *v.* Midland R. Co., 2 Ph., 469.
77, Flanagan *v.* G. and W. R. Co., L. R., 7 Eq., 116.
78, Wt. Union Tel. Co. *v.* Riche, 19 Kan., 517.
79, East and W. R. Co. *v.* Dawes, 11 Hun., 363.
80, Lyde *v.* Eastern B. R. R. Co., 36 Beav., 10 and 16.
81, Calloway *v.* Clarke, 32 Mo., 305.
82, Aurora Agricultural Soc. *v.* Paddock, 80 Ill., 263.
83, Norwegian T. Iron Co., 35 Beav., 223; Moss *v.* Averill, 10 N. Y., 449.
84, Cohen *v.* Wilkinson, *supra.*
85, Taunton *v.* Royal Ins. Co., 2 H. & N., 135,
86, L. R., 1 C. P., 499.

notes and bills, that such would be *ultra vires* and the company would not be liable thereon. This was upon the ground that it would be contrary to the law governing negotiable paper to allow an inquiry to be gone into between the company and the *bona fide* holder for value, without notice, as to whether the bill was issued for a legitimate purpose or not. But it is now well settled that a corporation not prohibited by law from doing so, and without any express power in its charter for the purpose, may issue negotiable paper, provided it were given for any legitimate purpose for which the corporation was created.[87]

Thus a corporation, chartered to erect a monument, is liable upon a bill properly accepted in pursuance thereof;[88] or a corporation to build a bridge is liable on its notes for labor and material;[89] or a railroad corporation is liable on its notes for material to be used in its construction;[90] but if the notes were accepted for accommodation of another company in constructing its road, it would be *ultra vires*.[91]

Thus by a liberal construction, it is incidental to any corporation to borrow money to carry on its business.[92] And according to Selden, J., in Bissell's case, if a corporation was authorized to issue negotiable paper for any purpose, it could not set up the plea of *ultra vires* because it was issued for another purpose than that authorized.[93] In the case of Monument National Bank,[94] Hoar, J., in reference to the abuse of that power said: "The abuse not being known to the other "contracting party, the doctrine of *ultra vires* does not apply."

It would be *ultra vires* of a manufacturing corporation to give its note for shares in a bank,[95] or purchase, hold or deal in the stock of another corporation, unless expressly authorized by law.[96] Even if the note of a municipal corporation is in the hands of a *bona fide* holder for value without notice, and there is nothing upon the face of the instrument to indicate that it was made *ultra vires*, that defense could not

87, Moss *v.* Averill, *supra;* Mott *v.* Hicks, 1 Cowan, 513; Moss *v.* Oakley, 2 Hill, 265; Moss *v.* Rossie Lead Mining Co., 5 Hill, 137; Police Jury *v.* Britton, 15 Wall., 566; Alcott *v.* Tioga R. Co., 40 Barb., 179; Clark *v.* Farmers' Woolen M'f'g Co., 15 Wend., 256; Richmond R. Co. *v.* Smead, 19 Grat., 358; Smith *v.* Eureka Flour Mills, 6 Cal., 1; Union Bank *v.* Jacobs, 6 Humph., 515; Rockwell *v.* Elkhorn Bank, 13 Wis., 653; Hardy *v.* Merriwether, 14 Ind., 203; Clark *v.* School Dist. No. 7, 3 R. I., 199; Lucas *v.* Pitney, 3 Dutch, 221; Oxford Iron Co. *v.* Spradley, 46 Ala., 88; Bradley, *v.* Ballard, *supra.*

88, Hayward *v.* Pilgrim Soc., 21 Pick., 270; Davis *v.* Bldg. Union, 33 Md., 285.

89, Barry *v.* Mechanics E. Co., 1 Sand. Ch., 280.

90, Hamilton *v.* R. R. Co., 9 Ind., 358.

91, Smead *v.* R. R. Co., *supra.*

92, Field on Corp., p. 249.

93, *Supra:* also Supervisor *v.* Schenck, 5 Wallace, 772; also Gelpche *v.* Dubuque, 1 Wall., 175.

94, 101 Mass., 57.

95, Sumner *v.* Marcy, 3 W. and M., 105.

96, Green's Brice, p. 95 n.; Franklin Co. *v.* Lewiston Bank, 68 Me., 43.

be maintained,[97] though if it were not held *bona fide* it could not be enforced.[98] It would not be incidental to the powers of a private corporation to assume the debt of another corporation and issue notes in payment thereof;[99] nor to engage as surety for the business of another corporation in which it had no interest;[100] nor incidental to the powers of a national banking corporation to procure the indorsement and discounting of a note or bill, when it has no interest therein;[101] nor to purchase promissory notes for speculation.[102]

But a national bank may take a mortgage to secure an existing indebtedness,[103] though for a future loan it would be illegal,[104] and it may take an assignment of a note secured by a trust deed upon real estate.[105]

The foregoing applies to private corporations. A different rule obtains as to municipal corporations. "Dillon on Municipal Corporations"[106] states it as follows: "The general "principle of law is settled that the agents, officers or even "city council of a municipal corporation cannot bind the "corporation by any contract which is beyond the scope of "its powers. * * * It results from this doctrine that un- "authorized contracts are void, and in actions thereon the cor- "poration may successfully interpose the plea of *ultra vires*. "* * * If the act complained of lies wholly outside the "general or special powers of the corporation, as conferred in "its charter or by statute, the corporation can in no event be "liable, whether it directly command the performance of the "act, or whether it be done by its officers without its express "command."[107]

The reasons being that such corporations are never organized for gain and the courts will not presume assent of their members,[108] or that it is incidental to its powers. Accordingly it is *ultra vires* of a municipal corporation for a city council to pass a resolution to give a public entertainment and to pay

97, Comr's of Knox Co. *v.* Aspinwall, 21 How., 539; City of Lexington *v.* Butler, 14 Wall., 282: Allegheny City *v.* McClurkan, 14 Pa. St., 81; Devoss *v.* Richmond, 18 Grat., 338.

98, Franklin Co. *v.* Lewiston Savings Inst., *supra*.

99, State Bank *v.* U. S. Pottery, 34 Vt., 144.

100, Central Bank *v.* Emp. Stone Dressing Co., 26 Barb., 23.

101, Bank of Genesee *v.* Patcher Bank, 19 N. Y., 312.

102, 1st Nat. Bank *v.* Pierson, 24 Minn., 140.

103, Woods *v.* People's Nat. Bank, 83 Pa. St. 57; Mechanics' Nat. Bank *v.* Means, 10 Chicago L. N., 180; Upton *v.* Nat. Bank of Reading, 120 Mass., 153.

104, Crocker *v.* Whitney, 71 N. Y., 161.

105, Fridley *v.* Brown, 87 Ills., 151.

106, § 381

107, Dillon Munc. Corp., § 766. A different view was taken in Allegheny City *v.* McClurkan, Coutler, J., holding it would be liable, if there had been no objection until the right of third persons had attached; also Argenti *v.* City of San Francisco, 16 Cal., 255, but Cope, J., overruled this case in 20 Cal., 296, and an adverse view was held also in Cheeney *v.* Inhabitants of Brookfield, 60 Mo., 53.

108, Bradley *v.* Ballard, *supra*.

for the same from the city treasury;[109] for a mayor and city council to offer a reward for the arrest of a murderer;[110] to employ counsel to aid in the criminal prosecution of persons lately officers of the city for misconduct while in office;[111] to endow a place of worship at the borrower's expense;[112] to give compensation for an office abolished.[113] And bonds, issued in excess of corporate power are not enforcible by[114] or against[115] the corporation, and warrants, issued without express authority, are void in the hands of innocent holders.[116] Thus it seems that the rule is very strict against the validity of *ultra vires* acts in the primary sense of a municipal corporation.[117] The courts have not felt constrained to extend their powers, as in private corporations, and in these latter the liberal construction has aided justice and in a measure destroyed the effect of the plea of *ultra vires*.

Second. The courts have relieved against this doctrine, by allowing a recovery of the money or values produced, although the contract was *ultra vires* and void.

This is especially true in England, for her courts have held so firmly to the doctrine of *ultra vires*, that even though a contract of a private corporation be executed, it cannot be enforced.[118] This is the accepted method by which relief is obtained there. But in this country this principle is applied frequently in cases of municipal corporations, for the courts will not enforce such a contract against a municipal corporation. It is solid law, that such a recovery cannot be had in case of private corporations on such an *ultra vires* contract, because the stockholders and public may be thereby prejudiced and the corporation rendered unable to perform its duties, yet a recovery may be had for the consideration advanced in the proper action for money paid, labor done, or property delivered. It may repudiate the transaction if it chooses, but it must repudiate it altogether. "It cannot reprobate and yet approbate." To say that it cannot be sued upon an *ultra vires* contract is one thing, but to say it may retain the proceeds that have fallen into its hands through such contract is something so different that the latter shocks one's sense of right. And in such dealings the law raises an implied agree-

109, Austin *v.* Coggshall, 12 R. I., 329.
110, Hanger *v.* City of Des Moines, 52 Iowa, 193.
111, Butler *v.* Milwaukee, 15 Wis., 493.
112, Atty. Gen'l v. Aspinwall. 2 My. and Cr., 613.
113, Atty. Gen'l v. Mayor of Poole, 4 My. and Cr., 17.
114, City of Montgomery v. M. and W. Rl. Road Co., 31 Ala., 76.
115, McPherson v. Foster, 43 Iowa, 48.
116, Clarke v. Des Moines, 19 Iowa, 199.
117, Mayor v. Ray, 19 Wallace, 468.
118, Green's Brice's Ultra Vires, p. 42.

ment to give value or return the value received.[119] This principle was departed from in *Ex parte* Williamson,[120] but was revived *In re* Durham Co., &c., Building Society.[121]

In Burges' and Stokes' case,[122] a life insurance company had extended its business to marine insurance. This extension was held to be *ultra vires*, and the holders of the marine policies were not allowed to prove for the value of them. As to the premiums, however, Page-Wood, V. C., said: "It is "proved that they did so receive and apply these premiums, "and the amount might have been recovered, even at law, as "money had and received. The proof must therefore be allowed for the amount of the premiums paid."

In Hall *v.* The Mayor, &c., of Swansea,[123] it was held that the proprietor of tolls wrongfully taken and withheld from him by a corporation could sue the corporation in assumpsit for money had and received.

The leading case on this phase of the subject is *Ex parte* Chippendale.[124] In this case a joint stock company was formed in England for working a mine in Germany. The capital was limited and the directors had no power to raise money except by creating new shares. The mine was in danger of being seized under the law of the country, as the miners' wages were in arrears. To prevent this the directors, upon their own personal guarantee, borrowed sums from the company's bankers to pay the company's debts. The directors afterwards paid the bankers, and when the company was wound up, it was held that borrowing the money was *ultra vires*, but, as it had been for the benefit of the company, the directors being trustees, were, in that character, entitled to indemnity from their *cestuis que trustent* against expenses incurred *bona fide*.

In *Ex parte* Bignold[125] the directors of a trading corporation, without power to borrow money, had incurred a large debt on account of the company in due conduct of its affairs. It was held that the deed of settlement did not limit the liability of each member to the amount of his shares, as named in the deed, and that the directors were entitled to be repaid by a call upon the shareholders.

119, East London and N. W. R. Co. v. Bailey, 4 Bing., 283; Mayor v. Charlton, 6 M. and W., 815; Payne v. Strand Union, 8 Q. B., 326; Allegheny City v. McClurkan, *supra*; Moss v. Rossie &c, *supra;* Steamboat Co. v. McCutcheon, 3 Pa. St., 13; Balto. v. Reynolds, 20 Md., 1; Dill v. Wareham, 7 Met., 438; Argenti v. City of San Francisco, *supra;* Silver Lake Bank v. North, 4 Johns Ch., 376; Zoetman v. San Francisco, 20 Cal., 96.
120, L. R., 5 Ch., 309.
121, L. R., 12 Eq., 521.
122, 2 J. and H., 441.
123, 5 Q. B., 526.
124, 4 De., G. M. and G., 19.
125, 22 Beavan, 43.

In Loundes *v.* Garnett,[126] one of the directors of the company made advances to meet the necessary expenses of carrying on the concern, which was not in accordance with the borrowing powers. Page-Wood, V. C., held that the directors were entitled to recover the money advanced.

In re Cork and Yaughal R. Co.,[127] the company had expended its authorized capital, and resolutions were passed to raise money in order to purchase rolling stock, &c. And though this act was *ultra vires*, because the company had exhausted its borrowing powers, yet it was held that the persons to whom they were indebted should be reimbursed to the extent to which their loans had been used by the company.

This indicates the law in England, but in this country this doctrine is more particularly held of such acts of private corporations as are expressly or by necessary implication prohibited.

In White *v.* Franklin Bank,[128] the contract was in violation of an express prohibition, and it was held that the contract could not be enforced, but that the money paid could be recovered.

In Underwood *v.* Newport Lyceum[129] it was held that though the charter of a corporation may not confer the power of banking or issuing checks to pass as currency, and it may be a penal offense to issue such notes or checks, yet it must pay for plates and checks and notes procured to be made by its officers, although such contract is *ultra vires*. In Dill *v.* Wareham,[130] the corporation had raised money in advance on an unauthorized contract and the money was recovered in an action for money had and received.

In Oneida Bank *v.* Ontario Bank the bank issued a post dated draft. Acording to the statutes of the State this was not only *ultra vires* and void, but illegal, being prohibited. The court held that the party who had taken it upon a loan of money to the bank, was entitled to recover the money so loaned upon it, either upon the ground of the contract of loan, or, for money had and received.[131]

Concerning acts *ultra vires* in the secondary sense, the courts have given relief by applying the doctrine of estoppel *in pais* to exclude the defense in three classes of cases:

126, 33 L. J. Ch., 418. To the same effect see 29 Beavan, 353.
127, L. R., 4 Ch., 748; see also Ulster R. R. Co. v. Banbridge, &c., R. R. Co. Ir. R., 2 Eq., 190, and L. R., 17 Eq., 181.
128, 22 Pick., 181.
129, 5 B. Mon., 129.
130, 7 Met., 438.
131, 21 N. Y., 490. Further as to the right to recover see Hunt, J., 19 Wall., p. 484.

1. Where the stockholders have acquiesced in or ratified the proceeding, the plea of *ultra vires* is inadmissible.

Acts are *ultra vires* in the secondary sense, only because of the extraordinary circumstances under which they are performed, or because of the purpose of the corporation, or because of the absence of requisite conditions, and they "violate those provisions of the charter which regulate the "rights of the corporators with each other." A corporation may do an act illegal or *ultra vires* in the primary sense, and the conduct of the stockholders will not then affect the act.[132] But if the act is simply *ultra vires* in the secondary sense, through a want of power which affects only the interest of the stockholders, the assent, acquiescence or ratification of the stockhholders, will exclude the defense of *ultra vires* to actions by strangers dealing in good faith with the corporation.[133] This assent or ratification, as pointed out by Lord St. Leonards in Spackman *v.* Evans,[134] does not require that each shareholder had actual notice; it is sufficient that the thing to be ratified came to the knowledge of all who chose to inquire, and to which they ought to have objected, unless they propose to adopt the transaction.

Ratification is generally inferred from the proceedings of the parties, and may be by the members as *a whole* or by their agents.[135] An act which is illegal or contrary to public policy cannot be ratified.[136]

In England if the act were *prohibited* it could not be ratified,[137] though in this country there is a difference. Acts expressly or impliedly prohibited are not void as against one dealing with the corporation in good faith unless the act is pronounced void.[138] Justice Swayne said, "the question is, "did the legislature not only prohibit the act, but declare "further that the *prohibited* act shall be *void?*" Whatever a corporation can authorize its officers to do, it can ratify when the act has been performed,[139] but it must be by those who might have given authority at first, and not by individual members.[140] The parties ratifying must have power at the time the ratification was made.[141] A contract ratified by the

132, 9 Exch., 244; 9 Hisk, 543.
133, Empire Trans. Co. v. Blanchard, *supra:* Sandford v. Ætna Iron and Nail Co., *supra.*
134, L. R., 3 H. L., 222.
135, Green's Brice's Ultra Vires, 548.
136, Mr. Justice Blackburn, L. R., 7 H. C., 673.
137, Taylor v. Railway Co., L. R., 2 Ex. Ch., 379.
138, National Bank v. Matthews, 8 Otto, 625; Stephens v. Monongahela Nat. Bank, 7 N. W., 491.
139, McLaughlin v. D. and M. R. R. Co., 8 Mich., 100.
140, Taymouth v. Koehler, 35 Mich., 22; also Tracy v. Cuthrie Co. Agric. Soc., 47 Iowa, 27.
141, Cook v. Tullis, 18 Wallace, 332; Wood v. McCain, 7 Ala., 806.

shareholders will be obligatory though the corporation had no power to make it.[142] Even an unauthorized payment of a town treasurer may be ratified by a vote of a town meeting accepting his report in which such payment appears.[143] This principle is true, not only of actions of strangers against the corporation, but also where shareholders seek relief against an unauthorized act; and no majority, however large, can bind a dissenting shareholder, but he must ask for his relief in time.[144] Acts directly contrary to the provisions of the charter, if they be acquiesced in, cannot be avoided after third persons have acted upon them.[145]

In the leading case of Phosphate of Lime Co. *v.* Greene,[146] where defendant had purchased 400 shares of the company's stock, but failing to pay for the shares they were cancelled, this compromise, acceptance, and cancellation of their own stock was *ultra vires* according to the articles of association. It was acquiesced in five years, and on liquidation of the company, the liquidator brought an action to obtain payment for the 400 shares, but Brett, J., held there could be no recovery from the defendant.

In Erie R. Co. *v.* D. L. and W. and M. and E. Co.,[147] the complainants claimed, under their charter, the exclusive right to a railroad between Paterson and Hoboken. They saw the defendants build a road in sight of theirs and, finally, they sold to them a part of their land to help to complete the road. These acts were held by Beasley, C. J., to be sufficient to debar the complainants from ever calling in question the lawfulness of the structure.

In Kent *v.* Quicksilver Mining Co.,[148] the complainants' charter gave no authority to issue preferred stock, and the company did make such issue by authority of by-laws passed at a regular meeting. The stock was dealt in for four years, and then an action was brought to obtain a judicial declaration that the company had exceeded its powers in creating the stock, but the corporation was held by the court to have acquiesced and ratified the act and to be bound by it.

But to bind the members where the acts in question are clearly *ultra vires* of the directors, though *intra vires* of the corporation, it must appear that the members were duly informed.[149] And it was held where directors had exceeded

142, Aurora Agric. Soc. v. Paddock, *supra*.
143, Arlington, v. Pierce, 122 Mass., 270.
144, 37 Cal., 543.
145, Hazelhurst v. Savannah R. R. Co., 43 Ga., 52.
146, L. R., 7 C. P., 43.
147, N. J. Equity, 283.
148, 12 Hun., 53.
149, *Idem*.

their authority, by allowing members to forfeit their shares and retire from the company, that the acquiescence of the remaining shareholders, in the absence of proof, must not be presumed;[150] and that a member is not bound to know, and practically he cannot know, whether a director is acting within or exceeding the scope of his authority.[151] But it was ratification for a corporation to take possession of property and use it for corporate purposes, when its officers had given notes for it, and its power to hold it was doubtful.[152]

In Reuter *v.* Electric Tel. Co.,[153] the deed of settlement declared that the directors shall manage all the affairs of the corporation, and that all contracts above a certain value were to be signed by *three* directors. A contract above that value was made by the chairman alone. The plaintiff did work under it and received payment. The court held the contract was ratified by the directors and the company.

And also it was held ratification by the company where a railroad allowed its president to purchase locomotives, and give bills in payment thereof, and operate the road for three years without questioning the accounts rendered by that officer;[154] also where the governing board knew, and did not disapprobate, the act of an officer in paying out bank-notes contrary to a general statute;[155] likewise where the manager of a mining corporation, with power to make necessary contracts, had purchased a house as an office for the corporation and several meetings of the trustees were held in it;[156] and again where the cashier of a bank, without authority, drew from their bank and loaned part of the funds deposited there by the corporation, and at once notified the corporation's officers, and subsequently at a meeting of the board of managers, action was taken concerning the loan, but no dissatisfaction was expressed;[157] also where a mortgage of the corporate property was made by the president without special authority and there was long knowledge of the fact by the corporation.[158]

But it was held not to be a ratification where the articles of a joint stock company prohibited its officers from making purchases on credit, and they purchased goods on credit and received the goods into its store, and were seen by the mem-

150, Spackman v. Evans, *supra*.
151, Downs v. Ship L. R., 3 H. L., 343.
152, Moss v. Averill, *supra*.
153, 6 E and B., 341.
154, Olcott v. Tioga R, R. Co., 27 N. Y., 546.
155, Christian University v. Jordan, 29 Mo., 68.
156, Shaver v. Bear River Co., 10 Cal., 396.
157, New Hope and D. Bridge Co. v. Phœnix Bank, 3 N. Y., 156.
158, Sherman v. Fitch, 98 Mass., 59.

bers,[159] nor where the minority of the board of trustees of a mining corporation knew that the president had leased, without authority, certain of its mining grounds, and that the rents were reported by the superintendent as money received for *ores* sold.[160] To charge a corporation with the ratification of an unauthorized or illegal act, because it accepted the benefit, it should appear that the benefit was received with full knowledge of the character of it.[161] The inadmissibility of the plea of *ultra vires*, where there has been a ratification by the corporation, is nowhere better illustrated than in the leading case of Miners' Ditch Co. *v.* Zellerbach.[162] The trustees of the Miners' Ditch Company, without authority, conveyed by deed under the corporate seal, duly acknowledged and recorded, certain property to another corporation. The latter corporation remained in possession, and made many valuable improvements and paid off mortgages created by the former. Finally, the latter mortgaged it to the defendants, strangers, without notice. They in turn purchased it at sheriff's sale made at the instance of another creditor. No claim was made to the property by the Miners' Ditch Company for five years. Sawyer, C. J., said: "The corporation "itself is plaintiff. After five years acquiescence and long "after the property has passed into the hands of innocent "parties, who have advanced sums of money upon the faith "of its apparent acts, paid off large liens and greatly ex- "tended, improved, and increased the value of the property, "this corporation seeks to avoid its deed." He held this could not be done and that the defendants had a good and valid title in law and equity.

The principle of acquiescence and ratification applies more particularly to private corporations organized for pecuniary gain. If they have engaged in unauthorized acts to increase their gain, the assent of the members will be presumed, when it is necessary to carry out justice, but municipal corporations stand upon a different ground, and debts contracted in an unauthorized manner by the officers cannot be binding upon the tax-payers by their presumed assent.[163]

2d. When the contract has been executed or partly executed on either side, the plea is inadmissible. If a contract *ultra vires* of a corporation is executed or partly executed, it will be enforced in the United States (though it is different

159, Hotchkin v. Kent, 8 Mich., 526.
160, Yellow Jacket Mining Co., v. Stevenson, 5 Nevada, 224.
161, *Idem.*
162, 37 Cal., 543.
163, Bradley v. Ballard, *supra*,

in England),[164] provided it is not in violation of the charter or some statute prohibiting it.[165] As long as the terms of the contract remain unexecuted on both sides, at the instance of a stockholder or any other person authorized to make the application, a court of chancery will interfere and forbid the execution of a contract *ultra vires*.[166] Although a corporation in making a contract "acts in disagreement of its charter "where it is simply a question of authority or capacity to con- "tract, either on a question of regularity of organization or "power conferred in the charter, a party who has had the "benefit of the agreement, cannot deny its validity," * * as "it would be in the highest degree inequitable and unjust "to permit the defendant to repudiate a contract, the fruits "of which he retains."[167]

If a corporation recede after it has executed a contract and restitution will not afford complete justice,[168] the other contracting party may have it enforced.[169] A growing tendency of the courts warrants the statement that this is true of municipal as well as private corporations.[170]

It was held that the defense of *ultra vires* was inadmissible where a mining corporation was sued by a national bank for money loaned in excess of its powers;[171] and again where an action was brought by a railroad to recover the value of repairs which had been made upon a steamboat without authority, bought and sold by it;[172] and likewise where a national bank brought suit to recover money paid for the purchase of promissory notes, though it had no power to make such purchase,[173] and in a foreign corporation which had exceeded its powers in making a loan.[174] And it was inadmissible in the case of a corporation organized to manufacture fire-arms, which had sold and delivered a large number of railroad locks;[175] also where a corporation had issued notes without express authority and had received value on them;[176] and where a city had issued bonds without authority and a plank-road company had received the benefit of them.[177]

164, Green's Brice's Ultra Vires, p. 42.
165, St. Bd. of Agr. v. Street R. Co., 47 Ind., 407.
166, Bradley v. Ballard, *supra*.
167, Sedg. Stat. and Const. Law, 2 Ed., 73; Twp. of Pine Grove v. Talcott, 19 Wall., 666.
168, Comstock, J., in Bissell's Case, *supra*.
169, Oil Creek & C. R. Co. v. Pa. Trans. Co., 2 Norris, 160.
170, Argenti v. City of San Francisco, 16 Cal., 255; Allegheny City v. McClurkan, *supra*; B. C. R. & M. R. Co. v. Stewart, 39 Iowa, 267.
171, Gold Min'g Co. v. Nat. Bank 96, U. S., 604.
172, Rutland & B. R. R. Co. v. Proctor, 29 Vt., 98.
173, Attleborough Nat. Bank v. Rogers, Mass., 339.
174, Silver Lake Bank v. North, *supra*.
175, Whitney Arms v. Barlow, *supra*.
176, McClurkan's Case, *supra*.
177, City Council of Montgomery v. M. & W. Plk. Rd. Co., *supra*; 55 Ills., 417.

Bradley *v.* Ballard [178] is a leading case in this phase of the subject. A corporation was organized in the State of Illinois for the purpose of mining. The mining operations were carried on in Colorado. Money was borrowed for that purpose, and the corporation set up the defense of *ultra vires* to an action brought for recovery. Lawrence, C. J., said: "While the contract remains unexecuted on both sides it can-"not be enforced, but, when under cover of this principle, "a corporation seeks to evade the payment of borrowed "money, on the ground that it expended the money in prose-"cuting a business which it was not authorized to prosecute, "is pressing the doctrine of *ultra vires* to an extent which can "never be tolerated."

In the State Board of Agriculture *v.* Citizens' Railway Co. [179] the company offered a certain sum of money to the State Board of Agriculture on condition that the State Fair should be held on grounds near the terminus of their road, &c. The board accepted the offer, and acted accordingly, but the street railway company refused to pay the sum offered, on the ground that it had no authority to make such contract. Downey, J., said: "The street railway company has re-"ceived the benefits and advantages of the contract, but seeks "to avoid the payment of the consideration promised because "it had not the legal power to contract for the benefits which "it has actually received. In our opinion the street railway "company is not at liberty to assume this position."

The application of this principle is further shown in the case of Bissell *v.* The Michigan Southern, &c., R. Co.[180] This action was for negligence by the defendants, whereby the plaintiff was injured. The defense was that the operation of the road at the time and place was *ultra vires* and void. C. J. Comstock held that the company were liable, saying: "They have received "the benefit of the contract, and then when liability arises "interpose the violation of their own charter to shield them "from responsibility. * * * Such a doctrine is not only "shocking to the reason and conscience of mankind, but it "goes far beyond the law in regard to illegal contracts of pri-"vate individuals, * * * and though it seems to have "some support in judicial opinion, it has no foundation in law."

And in the latest case, that of Wright & Kimball *v.* The Antwerp Pipe Company *et al.*, [181] decided in Pennsylvania in

179, *Supra.*

180, 22d New York, 258. Selden, J., maintained the negative of the question, but the majority of the court were with Comstock, and he afterwards maintained the same opinion in Parish v. Wheeler, 22 N. Y., 494, and it is now recognized law.

181, 13 Pittsburg, L. J., No. 25, p. 235.

1883, a suit was brought on promissory notes given in consideration of certain stock duly delivered and accepted. The defendants pleaded *ultra vires*, that their charter prohibited the purchase of such stock. The court held the defendants liable, saying: "They accepted the stock and gave their notes "in payment, for which notes the plaintiff gave value in good "faith, and the plea of *ultra vires* comes from them with bad "grace. * * * If, as the defendants allege, they had vio- "lated their charter, it is a matter that is within the cogni- "zance of the attorney-general."

On this question of the inadmissibility of the plea of *ultra vires* to executed contracts, the federal courts point the same way as those of the State.[182] It appears, then, that the defense of *ultra vires* remains in full force only where the contract is executory.[183] But an executed contract will be enforced even though the State may proceed against the corporation by *quo warranto* for a forfeiture of its charter.

3d. Special proceedings will be upheld sometimes though *ultra vires* in themselves as being necessary to justice.[184] As where there has been a general restriction in the charter, an isolated case of excess beyond the limits prescribed, has been protected and the contract held binding, when the general practice of a corporation has been in strict conformity with its charter. In Potter *v.* Bank of Ithaca[185] the charter provided that its operations of discount and deposit should not be carried on elsewhere than in the village of Ithaca. The cashier discounted a note in New York city for the purpose of securing a demand due the bank. It was held binding. Also in Sacketts Harbor Bank *v.* Lewis County Bank,[186] the defendants had purchased a large quantity of merchandise from the plaintiffs. Both charters prohibited the dealing and trading in merchandise, &c., unless in selling the same when truly pledged by way of security for debts due the corporations. It was held an isolated case and binding on both corporations.

Courts are plainly adverse to the plea of *ultra vires*. And while they are inclined to prevent the execution of contracts, where in entering into them corporations have exceeded their powers, yet where there have been benefits received under such contracts, if in the primary sense they will either put such a construction upon the charter of the corporation as to hold it incidental to its powers, or allow a recovery of

182, Bradley, J., Galveston R. Co. v. Cowdrey, 11 Wall., 459; Davis, J., Smith v. Sheeby, 12 Wall., 358; Miller, J., Thomas v. R. R. Co., 101 U. S., 71.

183, Webber v. Agric. Soc., 44 Iowa. 239.

184, Green's Brice's Ultra Vires, p. 42.

185, Potter v. Bk. of Ithaca, 5 Hill., 490.

186, 11 Barb., 213.

the value received; if in the secondary sense, they will enforce its performance, if there has been acquiescence or ratification by the corporation, or if it is executed on either side. It will be enforced if the act were directly prohibited by the charter (provided the act was an isolated one) and such enforcement would further the ends of justice.

It seems that Allen, J., in Whitney Arms Company *v.* Barlow,[187] sums up the whole law as to contracts *ultra vires* of corporations in these words: "The plea of *ultra vires* should "not, as a general rule, prevail, whether interposed for or "against a corporation, when it would not advance justice, "but, on the contrary, would accomplish a legal wrong."

But, as before stated, a corporation is liable for its torts and frauds, and since every tort is in a measure *ultra vires*, it is no legal defense to set up that argument.

In Merchants' Bank *v.* State Bank[188] it was held that the doctrine of *ultra vires* did not apply. A corporation must do all its acts throught its agents, and for their acts it is responsible to the same extent as a natural person.[189] It will be liable for every degree of malicious or negligent tort or wrong which it commits, even if the wrongful act is foreign to its nature or beyond its granted powers.[190] A railroad was held liable for the negligence of its agents operating a road beyond its authority,[191] and it is not necessary that the corporation should previously authorize or subsequently ratify the act, in order to render it responsible for the tort or fraud.[192]

The courts in giving relief to third parties in *ultra vires* contracts have virtually destroyed the strongest arguments supporting *ultra vires*, and the State and the shareholders, by so doing, have been deprived of rights and privileges. And this liberal interpretation of corporate rights, this right to recover value, this enforcement of contracts executed, etc., becomes an infringement of the remaining and reserved rights of the State and permits the corporation to do what it was never intended, and may cause the public to lose its expected benefits and the stockholders their anticipated profits.

The State has a remedy and so have the stockholders. For *ultra vires* acts the former may exact a forfeiture of the charter of a corporation, the latter may restrain the commission

187, *Supra.* Also Union Water Co. v. Murphy's Fluming Co. et al., 22 Cal., 620; Morris R. R. Co. v. McCarthy, 96 U. S., 258.
188, 10 Wallace, 645.
189, N. Y. and N. H. R. Co, v. Schuyler, 34 N. Y., 50.
190, Phila. and Balto. R. Co. v. Quigley, 21 Howard, 209.
191, Bissell's Case, *supra.*
192, Brice's Ultra Vires, p. 358, note b. See full discussion of this subject pp. 331-366.

of the act. For any abuse or misuse of corporate authority or breach of trust, the State will exercise its authority.[193] If it aims simply to suspend for a while the franchise, the proceeding is by *quo warranto*,[194] but if it is to repeal the charter it is by *scire facias*.[195] If a corporation, by reason of its charter, were empowered to transact certain business and should engage in a totally different pursuit having no connection with the former, (as for example a change from insurance to banking,)[196] it would be a sufficient violation of its contract with the State, to justify a repeal of its charter. Thus it appears that the State, if it wishes to exercise it, has a sufficient remedy.

The right of the stockholder is by a proceeding in equity to restrain the corporation from applying its powers to purposes not within the scope of its power; this may be done by a single shareholder. No majority, however large, can compel a dissenting shareholder to submit to a change in the business.[198] This is recognized in the early case of Natusch *v.* Irving.[199] There a company was formed for granting fire and life assurances. It proceeded to issue marine policies. Lord Eldon restrained it upon application of a dissenting shareholder. This right is universally recognized today.[200] Creditors have the same rights as shareholders. If the stockholders and creditors permit the corporation to enter into an *ultra vires* contract, they will not be allowed to secure an injunction; and if they allow the company to receive the benefit it will be regarded as a ratification and prevent them from pleading *ultra vires*.[201] And it is but justice that if they have permitted *ultra vires* acts to be done when the interest of third parties is concerned, they should not be permitted to restrain the corporation from performing the acts.

Finally, it seems that in every *ultra vires* act of a corporation, three separate interests are involved, viz.: that of the State, shareholders, and third persons. The first has, as we have already seen, an adequate remedy. The second, if the interest of third persons has not attached, has also an adequate remedy, but if the interest of third parties is so involved, that they cannot be put in *statu quo*, the courts will regard their rights as paramount to those of the shareholders and will never enforce the strict doctrine of *ultra vires* when it would work a legal wrong.

193, Mumma v. Potomac, 8 Pete., 281; Comrs. v. Pittsburgh R. R. Co., 58 Pa. State, 26; Angell & Ames, § 767, cases cited.
194, Greene's Brice's Ultra Vires, p. 787.
195, *Idem.*
196, People v. Utica Ins. Co., 15 Johns, 358.
197, Dodge v. Wolsey, 18 Howard, 331.
198, Kean v. Johnson, 1 Stock't, 401, 9 C. E. Greene, 455.
199, 2d Cooper Ch. Case, part 2, p. 358.
200, Dodge v. Wolsey, *supra.*
201, R. R. v. Howard, 7 Wall., 413.